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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 528

BROAD RIVER POWER COMPANY, COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, AND F. D. CAMPBELL, PETITIONERS,

vs.

STATE OF SOUTH CAROLINA EX REL. JOHN M. DANIEL, ATTORNEY GENERAL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

WILLIAM MARSHALL BULLITT,
C. EDWARD PAXSON,
GEORGE M. LEPINE,
W. C. McLAIN,
Counsel for Petitioners.

(34,659)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 528

BROAD RIVER POWER COMPANY, COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, AND F. D. CAMPBELL, PETITIONERS,

vs.

STATE OF SOUTH CAROLINA EX REL. JOHN M. DANIEL, ATTORNEY GENERAL.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Broad River Power Company, Columbia Railway, Gas and Electric Company, and F. D. Campbell respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

I. This is a petition for a writ of certiorari, under Section 344 of the Judicial Code, to review a judgment

of the Supreme Court of South Carolina in favor of the State in a mandamus proceeding instituted by the Attorney General against the petitioners herein to compel them to operate a street-railway system which had been abandoned because of losses sustained in the operation thereof. (The judgment is contained in the opinion of the Court, R. 251.) The date of the judgment to be reviewed is July 9, 1929. A petition for a rehearing was filed on July 18, 1929, and was dismissed on September 25, 1929 (R. 272). The opinions of the State court have not yet been officially reported. (See R. 203, 251.)

II. The proceedings were instituted to require the petitioners herein to maintain and operate the street-railway system in the City of Columbia, S. C., and vicinity, operation of which was abandoned on March 11, 1927. The petitioner Columbia Railway, Gas and Electric Company (hereinafter called the railway company) was the owner of the street-railway system, F. D. Campbell was the manager of the company, and Broad River Power Company (hereinafter called the power company) was the purchaser of the gas and electric properties formerly belonging to the railway company and was the owner of its common stock. As such it was claimed that the power company was liable for the obligations of the railway company, including any obligation to operate the street-railway system. The principal defense set up in the proceedings was that the railway system had been operated for many years at an operating loss, amounting over the period of about 7 years preceding the abandonment of opera-

tions to about $675,000, without any allowance for depreciation or return on the investment (R. 1129), which amounted to $175,000 and $875,000, respectively, on a minimum basis (R. 159, 154), and that to require continued operation would deprive the petitioners herein of their property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution (R. 24). These losses were in part due to jitney competition, the city having licensed jitneys in large numbers (R. 522). Even prior to this competition, however, losses had been regularly incurred (R. 1129). The referee to whom the case was referred found that the railway had been, and could only in the future be, operated at a loss, and that under the Fourteenth Amendment to the United States Constitution operation could not be compelled (R. 195, 196). He recommended that the proceedings be dismissed (R. 196). The Supreme Court of South Carolina disapproved the conclusions of the referee and rendered judgment that the writ of mandamus issue as prayed for (R. 203). Cothran, J., dissented from the decision of the Court (R. 251).

III. The Supreme Court of South Carolina based its decision on the following grounds:

(*a*) That the statute of South Carolina (R. 809) under which the railway company was organized by a consolidation of an electric and gas company with a street-railway company created a single and indivisible franchise for the rendition of street-railway, electric, and gas services, which was not severed by a sale of

the gas and electric property pursuant to legislative authority, and that if the business as a whole was profitable, the abandonment of the street-railway service (without the abandonment of the other services) could not be sustained, reliance for this proposition being placed on *Ft. Smith Light and Traction Co. v. Bourland,* 267 U. S. 330, and similar cases involving attempts to abandon part of a line of railway covered by a single franchise (R. 218).

(*b*) That the statute creating the street-railway company constituted a contract with the State to operate the street railway, even though its operation could only be had at a loss (R. 221).

(*c*) That the ordinances of the City of Columbia granting the right to operate a street railway on the streets of the city constituted a contract to operate the same, and that the fact that operation could not be had except at a loss was no defense (R. 235, 237).

(*d*) That certain contracts between the street-railway company and land-development corporations (R. 851, 885, 864, 1063), under which extensions were built to the railway lines, required operation of the entire street-railway system, to the enforcement of which loss was no defense, and created public duties which could be enforced in these proceedings (R. 239, 241).

(*e*) That right-of-way grants made in consideration of "the advantage and benefit of the intervening lands" constituted contracts for operation to the enforcement of which loss was no defense, and created

public duties which could be enforced in these proceedings (R. 240, 241).

(*f*) That the evidence as to past losses did not conclusively show that with proper management the system could not be operated at a profit in the future (R. 250), and that great weight should be attached to the finding of the railroad commission (made after the institution of these proceedings) that if properly managed the railway could be made to yield a fair return, which conclusion was adopted by the court (R. 243).

(*g*) That the power company, as the purchaser of the electric and gas properties of the railway company, took the same burdened with the obligations of the railway franchises retained by the railway company, both by virtue of the provisions of the act authorizing the sale (R. 806) and because, under the evidence showing that the power company owned the stock of the railway company and controlled it, the companies must be treated as one entity (R. 205).

B.

Reasons Relied on for the Allowance of the Writ.

I. The question involved in this case is one of national importance in view of the precarious financial condition of street-railway systems throughout the United States (which is a matter of common knowledge) and is one which vitally affects the right of those who have invested large sums in such enterprises to salvage a portion of their investment. It is also a question

which, wrongly decided, will seriously impede the expansion of the electric industry, many electric properties being now, or having been at some time in the past, connected with a street-railway system.

II. The judgment of the State court requiring your petitioners to operate the railway system in question deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, which was specifically set up and pleaded, and such judgment and decision is in direct conflict with the decisions of this Court in the following cases:

Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 393;

Bullock v. Florida Railroad Commission, 254 U. S. 513;

Texas v. Eastern Texas Railroad Company, 264 U. S. 79;

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522;

Ft. Smith L. & T. Co. v. Bourland, 267 U. S. 330.

"Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 64 L. ed. 323, P. U. R. 1920 C, 579, 40 Sup. Ct. Rep. 183. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State, and have been

allowed to exercise the power of eminent domain." *Bullock v. Florida Railroad Commission,* 254 U. S. 513, 520, 521.

III. In a case of this character this Court has decided that it will determine for itself whether any contract exists which can sustain what would otherwise amount to a confiscation, and that it is not concluded by the decision of the State court. *Georgia Ry. & P. Co. v. Decatur,* 262 U. S. 432; *Texas & Eastern Texas R. Co.,* 264 U. S. 79.

IV. The decision of the State court that the act under which the railway company was incorporated constituted a grant of a combined franchise for street-railway, electric and gas service (R. 218), based on extracts from other statutes interpolated by the court into the Consolidation Act (R. 215) which are not in the act itself (R. 809), is in direct conflict with the decisions of this Court in *Philadelphia & W. R. Co. v. Maryland,* 10 How. 374; *Tomlinson v. Branch,* 15 Wall. 460; *The Delaware Railroad Tax,* 18 Wall. 206; *Central Railroad, etc., Co. v. Georgia,* 92 U. S. 665; *Branch v. City of Charleston,* 92 U. S. 677; *Greene County v. Conness,* 109 U. S. 104; *New Orleans Gas Co. v. Louisiana Light Co.,* 115 U. S. 650; *Chesapeake, etc., R. Co. v. Virginia,* 94 U. S. 718, which hold that in such a case the franchises of the constituent companies continue as separate franchises in the consolidated company. In *Greene County v. Conness,* 109 U. S. 104, the court said:

"If only a sale of the road to another company had been authorized and made, then it

> might very plausibly have been contended that the purchasing company took and held it under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company; but 'consolidation' is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated."

V. The decision of the State court that the fact that the electric and gas business was being conducted by the power company at a profit precluded an abandonment of street-railway service by the railway company on account of losses, which should be met out of the gas and electric earnings (R. 218), is in direct conflict with the decision of this Court in *Brooks-Scanlon Co. v. Railroad Commission,* 251 U. S. 396; *Northern Pac. R. Co. v. North Dakota,* 236 U. S. 585; *Norfolk & W. R. Co. v. Conley,* 236 U. S. 605, as well as with the decisions of other courts in well reasoned opinions.

Northern Ill. L. & T. Co. v. Illinois Commerce Com., 302 Ill. 11;

Mt. Carmel Public Utilities & Service Co. v. Public Utilities Com., 297 Ill. 303;

Illinois Trust & Sav. Bank v. Doud, 105 Fed. 123;

Re Northwestern Electric Service Co., 17 Pa. Corp. Rep. 246.

In *Brooks-Scanlon Co. v. Railroad Commission,* 251 U. S. 396, this court said:

"The plaintiff may be making money from its saw mill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. ed., 77, 84. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return."

VI. The decision of the State court that the charter of the railway company constituted a contract with the State which required operation at a loss (R. 221) is in direct conflict with the decisions of this Court in *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396; *Texas v. Eastern Texas R. Co.*, 264 U. S. 79; *Bullock v. Florida Railroad Commission*, 254 U. S. 513.

"The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract that it will do so can be elicited from the acceptance of the charter or from putting the road in operation."

Texas v. Eastern Texas R. Co., 264 U. S. 79, 85.

VII. The decision of the State court that the ordinances of Columbia (R. 833 *et seq.*) constituted contracts which required operation of the street railway at a loss (R. 235, 237) is in direct conflict with the

decisions of this Court in *Brooks-Scanlon v. Railroad Commission*, 251 U. S. 396; *Texas v. Eastern Texas R. Co.*, 264 U. S. 79; *Bullock v. Florida Railroad Commission*, 254 U. S. 513; *Ft. Smith L. & T. Co. v. Bourland*, 267 U. S. 330, and is not supported by *Columbus Railway, etc., Co. v. Columbus*, 249 U. S. 399, which involved an ordinance for a fixed term, at a fixed rate of fare, an acceptance, and an absence of total operation at a loss, none of which factors exist in this case. The decision of the State court also conflicts with the decisions of other courts in well-reasoned opinions.

Potter-Matlock Trust Co. v. Warren County, 182 Ky. 840;

Mt. Carmel Public Utilities & Service Co. v. Public Utilities Com., 297 Ill. 303.

Northern Ill. L. & T. Co. v. Illinois Commerce Com., 302. Ill. 11;

Charleston-Isle of Palms Traction Co. v. Shealy, 266 Fed. 406.

VIII. The decision of the State court that the contracts with land-development corporations (one of which had been extinguished by a deed R. 1066) were existing agreements which required continued operation, even at a loss, and created public duties which could be enforced in these proceedings (R. 239, 241), is contrary to the decisions of this Court in *Texas, etc., R. Co. v. Marshall*, 136 U. S. 393; *German Alliance Ins. Co. v. Home Water Co.*, 226 U. S. 220, and with the decision in *Jones v. Newport News & M. Valley Co.*, 65 Fed. 736 (opinion per Taft, J.), as well as with the previous decision of the same court in *Ancrum v. Camden Water, etc., Co.*, 82 S. C. 284.

IX. The decision of the State court that there existed right-of-way agreements which required continued operation at a loss (R. 240, 241) is without any evidence to sustain the same.

X. The decision of the State court cannof be sustained on the theory that private contracts were enforced in favor of private corporations and individuals, involving no constitutional question, for the reason that the judgment of that court grants to the attorney general and all interveners the relief "as prayed for" (R. p. 251, fol. 287), and the relief prayed for by the attorney general was that the respondents be directed "to furnish and maintain adequate and satisfactory street-car service thereon in the city of Columbia and its environs permanently in accordance with the provisions of their charters, contracts, and provisions of law applicable thereto" (R. p. 8, fol. 11), and this is the prayer which is joined in by the interveners. (See, *e. g.*, R. p. 47, fol. 62.) In other words, "adequate and satisfactory street-car service * * * in the city of Columbia" could not have been adjudicated under alleged contracts having reference only to detached portions of the system and not providing for "adequate and satisfactory service."

XI. The decision of the State court that evidentiary effect should be given the finding of the Railroad Commission, which is a legislative body, that the railway could, if properly managed, be operated in the future at a profit (R. 243), which finding was made after the commencement of these proceedings, in which the Railroad Commission later joined as a party, is in

direct conflict with the decisions of this Court in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287; *Prendergast v. N. Y. Tel. Co.*, 262 U. S. 43; *Oklahoma Operating Co. v. Love*, 252 U. S. 331; *Bluefield Water Works and Imp. Co. v. Public Service Commission*, 262 U. S. 679; and was without evidence to support it, as the evidence before the Railroad Commission, which is a part of the record (R. 884 *et seq.*), was uncontradicted and was to the effect that losses had been and must be incurred in such operation.

XII. The decision of the State court that the power company could be compelled to operate the railway system of the railway company, even though such operation must be carried on at a loss (R. 205), is violative of the Fourteenth Amendment to the United States Constitution and in direct conflict with the decisions of this Court in *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396; *Bullock v. Florida Railroad Commission*, 254 U. S. 513; *Texas v. Eastern Texas Railroad Co.*, 264 U. S. 79; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522; *Ft. Smith L. & T. Co. v. Bourland*, 267 U. S. 330; and there was no evidence, statute, ordinance, or contract which justified such a judgment.

XIII. The decision sought to be reviewed is a final judgment passed by the highest court of the State of South Carolina in which a decision could be had and in which a title, right, privilege, or immunity was specially set up and claimed by your petitioners under the Constitution of the United States, the decision of said court denying such claim.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of South Carolina, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 360, in the Original Jurisdiction; *Ex Parte:* State of South Carolina *ex Relatione* John M. Daniel, Attorney General, Petitioner, against Broad River Power Company, Columbia Railway, Gas and Electric Company, and F. D. Campbell, Respondents, and that the said judgment of the Supreme Court of South Carolina may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

BROAD RIVER POWER COMPANY,
COLUMBIA RAILWAY, GAS AND
ELECTRIC COMPANY,
F. D. CAMPBELL,
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